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In the Supreme Court of the United States

OCTOBER TERM, 1992

COMMISSIONER OF THE LAND OFFICE, OF OKLAHOMA, PETITIONER

v.

RANDY L. CROOK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 11 U.S.C. 506(a), which authorizes bankruptcy courts to "write down" the amount of a creditor's secured claim, applies to secured claims held by petitioner, a state entity.

2. Whether it violated the Tenth or Eleventh Amendments to the United States Constitution for the bankruptcy court to "write down" the value of petitioner's secured claims.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-211

COMMISSIONER OF THE LAND OFFICE, OF OKLAHOMA, PETITIONER

v.

RANDY L. CROOK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 966 F.2d 539. The opinions of the district court (Pet. App. B1-B12) and the bankruptcy court (Pet. App. C1-C17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1992. The petition for a writ of certiorari was filed on August 3, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of the bankruptcy proceedings of respondents Randy L. Crook and John Wedman. Crook and Wedman borrowed money from petitioner, an entity of the State of Oklahoma, and secured their loans with mortgages on their farm properties. Crook and Wedman filed for protection under Chapter 12 of the Bankruptcy Code (Code), 11 U.S.C. 1201 *et seq.*, when petitioner began foreclosure proceedings under the terms of their mortgages. See Pet. App. B2-B3.[1]

As part of their reorganization effort, debtors sought to have the amount of petitioner's secured claims adjusted pursuant to the so-called "write down" provision of the Code. 11 U.S.C. 506(a); see also 11 U.S.C. 103(a) (applying provisions of Chapter 5 of the Code to Chapter 12). Under Section 506(a), certain allowed claims of a creditor are deemed to be secured claims up to the value of the property securing the debt, and unsecured claims in the amount that the claim exceeds the property's value.[2]

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[1] Chapter 12 of the Code applies to reorganizations of family farms. In most substantive respects, Chapter 12 parallels the relief available to an individual or business debtor under Chapter 11.

[2] Under Section 506(a), the remaining unpaid debt would be unsecured and paid, along with other unsecured debts, *pro rata*, in a reorganization plan. If the debtor successfully complies with the payment requirements made under a confirmed plan, unsecured debts not paid under the plan may, with certain exceptions, be discharged. 11 U.S.C. 1228.

Under 11 U.S.C. 1222(b)(2), the Code allows the reorganization plan to "modify the rights of holders of secured claims." Similar powers to adjust the liens related to allowed claims are set forth in the other reorganization chapters of the Code. See 11 U.S.C. 1123(b)(1) and 1322(b)(2). That relief is not available to debtors in liquidation proceedings. Cf. *Dewsnup* v. *Timm*, 112 S. Ct. 773 (1992); Pet. App. A3 n.1.

Petitioner, the State of Oklahoma, *ex rel.* the Commissioners of the Land Office,[3] contested the exercise of bankruptcy jurisdiction over its secured claims. Petitioner argued that the Bankruptcy Code did not authorize the court to exercise jurisdiction with respect to the State's loans. Petitioner also argued that any action by the bankruptcy court affecting its claims would violate the State's sovereign immunity from federal court jurisdiction under the Eleventh Amendment, and would also violate the State's sovereignty as preserved by the Tenth Amendment. The United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of 11 U.S.C. 106(c), the Code provision dealing with waivers of sovereign immunity.

Sitting en banc, the bankruptcy court in the Western District of Oklahoma rejected petitioner's claims in their entirety, holding that Section 106(c) of the Code brought petitioner's secured claims within the scope of the debtors' bankruptcy cases and that the statute was constitutional. Pet. App. C1-C15. Subsequently, the bankruptcy court issued orders confirming reorganization plans that decreased petitioner's secured interest in both debtors' farm properties and changed the terms of the mortgage obligations. *Id.* at D1-F8. Petitioner appealed to the district court, which affirmed the rulings of the bankruptcy court. *Id.* at B1-B12.

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[3] We note that the State of Oklahoma is not a party in this litigation, but rather appears *ex relatione* for the Commissioners of the Land Office. The State's Land Office comes within the definition of governmental entity under the Code. See 11 U.S.C. 101(27) (Supp. III 1991) (defining governmental units to include a "department, agency, or instrumentality of * * * a State." 11 U.S.C. 101(27) (Supp. III 1991). We also note that the lower courts properly treated the bankruptcy court's orders as running against the individual Commissioners of the Land Office, and not the State, *eo nomine*. Petitioner has not contended otherwise in this Court.

2. The court of appeals affirmed. Pet. App. A1-A15. The court of appeals held that Section 106(c) of the Code authorized the bankruptcy court to "write down" the value of petitioner's secured claims and to take other action that affected the value of those claims. Pet. App. at A8, citing *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992). That action did not constitute an award of money damages, but rather was akin to declaratory and injunctive relief. The court of appeals held that such remedies are available against state officials under *Ex parte Young*, 209 U.S. 123 (1908), and *Edelman* v. *Jordan*, 415 U.S. 651 (1974), without implicating the State's sovereign immunity under the Eleventh Amendment. Pet. App. A8-A10.[4] The court therefore found it unnecessary to consider whether Congress's Article I bankruptcy power, see U.S. Const. Art. I, § 8, Cl. 4, permitted it to abrogate the States' Eleventh Amendment immunity.

Turning to petitioner's Tenth Amendment claim, the court of appeals rejected petitioner's suggestion that it disregard this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Pet. App. A14-A15. The court also rejected petitioner's argument that its challenge to the validity of 11 U.S.C. 106(c) was justiciable because that statute was enacted

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[4] The court of appeals rejected petitioner's argument that the rule of *Ex parte Young*—that declaratory and injunctive relief against state officers acting in their official capacity does not implicate the Eleventh Amendment—does not apply in this case because petitioner is not accused of any federal "delict." The court noted that "any attempt by the state to resume its foreclosure action or otherwise enforce the debtors' obligations in disregard of the bankruptcy stay would constitute a wrongful act of the type contemplated in the teachings of *Ex parte Young*." Pet. App. A12.

as the result of an extraordinary failure of the national political process. Pet. App. A14-A15.

ARGUMENT

The decision of the court of appeals is correct in all respects, and does not conflict with any decision by this Court or any other court. Further review is therefore unwarranted.

1. Section 106(c) of the Code, 11 U.S.C. 106(c), details the circumstances in which the determinations of a bankruptcy court bind a governmental unit (defined in 11 U.S.C. 101(27) (Supp. III 1991) to include States) that has not consented to the court's jurisdiction by filing a claim against the debtor. That provision states:

> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. 106(c).[5] Thus, by its plain language Section 106(c)(2) mandates that governmental units are bound by determinations of issues arising under provisions of the

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[5] Subsections (a) and (b) of Section 106 deal with the States' liability for monetary relief in bankruptcy court, and limit its availability to circumstances in which the debtor has a compulsory counterclaim to a claim of a governmental unity (Section 106(a)), or as an offset to an allowed claim of a governmental unit (Section 106(b)). See *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992); *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 101-102 (1989) (plurality opinion).

Code containing the so-called trigger words "creditor," "entity," or "governmental unit[s]" contained in Section 106(c)(1). See *Hoffman*, 492 U.S. at 101 (plurality opinion).

Although petitioner notes that this Court's decisions in *Hoffman* and *Nordic Village* did not resolve all of "the interpretive issues surrounding" Section 106(c) (Pet. 18), petitioner points to no issue of statutory interpretation raised in this case that merits this Court's review. Petitioner does not dispute that, if Section 106(c) is not to be rendered meaningless, it must mean at minimum that Code sections containing the trigger words apply to governmental units, and that the bankruptcy courts may therefore issue orders affecting the interests of States so long as they do not award monetary relief. See *Hoffman*, 492 U.S. at 102 (Section 106(c)'s language "is more indicative of declaratory and injunctive relief") (plurality opinion); *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015-1016 (1992); *Neavear* v. *Schweiker (In re Neavear)*, 674 F.2d 1201 (7th Cir. 1982).[6] And petitioner cites no decision from this or any other court that would call into question the applicability of Section 106(c) to the circumstances of this case.

Petitioner does contend (Pet. 19) that Section 106(c) requires the presence of its trigger words—"creditor," "entity," or "governmental unit"—before a Code provi-

[6] The Court in *Nordic Village* did not find it necessary to construe Section 106(c) with respect to non-monetary relief against governmental units (there, the United States), because the issue was not presented. See 112 S. Ct. at 1016. Petitioner has not, however, offered any reading of Section 106(c) that would not authorize, at minimum, the bankruptcy courts to write down the claims of governmental units and confirm plans affecting their claims. Accordingly, there is no basis for the Court to review the theoretical issues relating to Section 106(c) raised in the petition. See Pet. 20-21.

sion is made applicable to the States. Petitioner further contends, however, that Chapter 12 of the Code contains none of the trigger words and that Section 106(c) therefore does not apply in Chapter 12 cases. Although we have no quarrel with the proposition that Code provisions must contain trigger words to be applicable to the States, there is no doubt that the provision at issue in this case contains the requisite trigger words. Petitioner's claim is therefore without merit.

First, petitioner errs in suggesting that Chapter 12 of the Code contains no trigger words. Section 1227, 11 U.S.C. 1227, specifically states that "the provisions of a confirmed plan bind * * * each creditor." In light of that language, it is plain that a governmental unit that is a creditor in a bankruptcy is bound by the terms of a confirmed plan of reorganization under Chapter 12. Thus, the bankruptcy court's orders confirming the debtors' plans fully bind petitioner.[7] Second, in determining whether a Code provision applies to governmental units, this Court has not focused generally on the Chapter under which the bankruptcy case is proceeding, but rather on the particular Code section at issue. Thus, the Court in *Hoffman* did not search Chapter 7 of the Code for trigger words; rather, the Court noted that Section 542(b) and Section 547(b), the two provisions that were

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[7] Petitioner argues (Pet. 20 n.13) that Section 1227's use of the trigger word "creditor" has no effect on the State because it applies only to validly confirmed plans of reorganization. The statute provides, however, that plan confirmation binds each creditor "whether or not the claim of such creditor * * * is provided for by the plan, and whether or not such creditor * * * has objected to, has accepted, or has rejected the plan." 11 U.S.C. 1227. Thus, a plan may be validly confirmed, and bind all creditors—a term that unquestionably includes States—to its terms, regardless of whether the creditors have participated in the bankruptcy process.

asserted to apply to the State in that case, contained the trigger word "entity." See *Hoffman*, 492 U.S. at 101 (plurality opinion); 492 U.S. at 107-110 (Marshall, J., dissenting). Likewise, in *Nordic Village*, in discussing the applicability of Section 106(c), the Court focused not on the Chapter of the Code involved, but on the provisions under which the claim at issue was brought against the government. See *Nordic Village*, 112 S. Ct. at 1015-1016. In this case, the provision at issue is 11 U.S.C. 506(a), which authorized the bankruptcy court to "write down" petitioner's secured claim; that provision contains the trigger word "creditor" and therefore applies to petitioner.

2. Petitioner contends that, notwithstanding Section 106(c), the Eleventh Amendment bars any order by the federal courts that would affect its mortgage rights. The court of appeals properly concluded, however, that the Eleventh Amendment is not implicated in this case because the court's action did not have the effect of awarding retrospective monetary relief against the State. Pet. App. A8-A12.

a. This Court's cases have long maintained the distinction, for Eleventh Amendment purposes, between retrospective monetary relief and prospective declaratory relief. See, *e.g.*, *Ex parte Young*, 209 U.S. 123 (1908); *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Quern* v. *Jordan*, 440 U.S. 332 (1979). The "write down" of the loans in this case did not have the effect of ordering monetary relief of any sort against the State. The bankruptcy court merely adjusted the future terms of petitioner's claims against the debtors. Moreover, even if the order caused some expenditure of funds, that is consistent with the established principle that prospective equitable relief may have an ancillary effect on a State's finances without running afoul of the Eleventh

Amendment. See *Edelman*, 415 U.S. at 667-668; *Quern*, 440 U.S. at 347-348.

Petitioner nonetheless argues (Pet. 22-24) that, because state law requires it to repay any shortfall in the loans it makes to the state permanent school fund, the orders in this case will have the inevitable effect of causing the State to expend funds. That effect, petitioner argues, is direct rather than ancillary, and therefore barred by the Eleventh Amendment. Petitioner's claim does not warrant this Court's review.

First, it is speculative to suggest that any shortfall requiring repayment to the state school fund will occur, since the reorganization plans in this case provide for full repayment of the principal amount of petitioner's loans to the debtors. See Gov't C.A. Br. 7-8. Moreover, even assuming that petitioner is correct that some shortfall will occur and that it will have to repay that amount to the school fund, that will be the result of state law, and not any order of the federal court. And even if that occurs, economic reality rather than any order of the bankruptcy court will have been the cause. The only reason that the value of petitioner's mortgage was subject to being "written down" by the bankruptcy court was that petitioner was owed more than the market value of debtors' properties; thus, even if the State had succeeded in foreclosing on debtors' mortgages and selling their properties, there still would have been a shortfall between the amount petitioner was owed and the amount it collected. Thus, even if petitioner is correct that it will be required to repay the school fund the amount of any shortfall, the bankruptcy court's order cannot plausibly be viewed as creating that obligation. As this Court stated in *Quern*, petitioner's argument fails because "the chain of causation which petitioner seeks to establish * * * contains numerous missing links, which can

be supplied, if at all, only by the State * * * and not by a federal court." *Quern*, 440 U.S. at 347.[8]

In any event, petitioner's fact-specific claim does not present any legal issue that requires this Court's attention. Petitioner merely asserts a misapplication of *Quern* and *Edelman* to the facts of this case.[9]

b. Petitioner contends (Pet. 12-17) that *Ex parte Young*, which makes state officials subject to suit in federal court for declaratory relief stemming from violations of federal law, is inapplicable for another reason. Petitioner argues that *Ex parte Young* permits federal court jurisdiction only if there is an existing federal "delict" on the part of the state officers. Because petitioner had not yet violated any federal laws when the bankruptcy petitions were filed in this case, petitioner argues that there was no basis for declaratory or injunctive relief against the State.

As the court of appeals recognized, however, the filing of the debtors' voluntary bankruptcy petitions created an "automatic" stay pursuant to 11 U.S.C. 362(a), after

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[8] Petitioner argues (Pet. 22-24) that the repayment obligation is created by federal law, because Oklahoma's enabling act prevents it from altering its trust obligation to the school fund. That claim is unpersuasive. Although the Supremacy Clause may bar the State from extinguishing its trust obligation, a substantive question relating to the circumstances in which the repayment obligation is triggered would present primarily issues of state law. In any event, we do not see how the nature of the bankruptcy court's order can change depending upon the impact it may have on a creditor's obligation to make up a bad debt to a third party.

[9] Indeed, to the extent that petitioner presents any legal issue for review, it is the unprecedented claim that a federal court order is barred under the Eleventh Amendment because it may someday cause one state agency to pay funds to another state agency because of the operation of state law. Petitioner cites no authority to support that claim, which is, in any event, based on the peculiarities of Oklahoma state law.

which any foreclosure or other efforts to enforce the terms of debtors' loans would have been a violation of federal law. Pet. App. A12-A13. *Ex parte Young* does not require that a federal court refrain from exercising jurisdiction until there is an existing violation of federal law. Rather, it is sufficient if there is an imminent threat to an interest protected by federal law. See *Ex parte Young*, 209 U.S. at 159-167.[10]

Petitioner relies on this Court's decision in *Cory* v. *White*, 457 U.S. 85 (1982), for the proposition that a federal "delict" is a necessary predicate to jurisdiction founded on *Ex parte Young*. *Cory* involved competing claims by California and Texas that both had jurisdiction to tax the estate of Howard Hughes; each State's argument was based on the claim that Hughes was domiciled there at the time of his death, a question of state law. The estate's executor filed a federal interpleader action against the taxing officials of each State, seeking to have the competing States' claims against the estate resolved in one proceeding.[11] This Court held that the Eleventh Amendment barred the action, because there was no issue of federal law in the case. Relying on its decision in *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292 (1937),

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[10] In this case, we note that the protection afforded to the debtors by the automatic stay was crucial. Both debtors filed their petitions for bankruptcy relief after the State had pursued foreclosure proceedings. Pet. App. B2-B3. Indeed, debtor Wedman filed for bankruptcy the day before a sheriff's sale of his land was scheduled to take place. *Id.* at B2.

[11] Under the federal interpleader statute, 28 U.S.C. 1335, a party may bring adverse claimants to a single fund into federal court to have their competing claims resolved in one proceeding, provided that there is diversity of citizenship between at least two adverse claimants. In *Cory*, the executor claimed that the taxing officials of California and Texas were diverse parties. See 457 U.S. at 87-88.

the Court rejected the argument that *Ex parte Young* and *Edelman* v. *Jordan* permitted declaratory or injunctive actions to be brought against state officers in any circumstances. 457 U.S. at 89-91.

Cory provides no support for petitioner, because in that case both States could have taxed the Hughes estate without implicating any issue of federal law. See 457 U.S. at 89-91.[12] In this case, by contrast, the court of appeals was correct to conclude that any action by petitioner to enforce its rights against debtors would have been squarely foreclosed by the automatic stay provision of 11 U.S.C. 362(a). Moreover, the administration of the debtors' estates under the Code, and the confirmation of their reorganization plans, were obviously accomplished pursuant to federal law. As the court of appeals recognized, "[t]hat this appeal does not follow an encroachment by the state on federal * * * rights is no more than a procedural by-product of the point at which the state chose to challenge the bankruptcy court's order. The issues would be unchanged had the state pressed its foreclosure action and waited for the debtors to use the order as a shield." Pet. App. A13.[13]

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[12] Petitioner suggests (Pet. 15 n.9) in passing that one of the States in *Cory* may not have had a sufficient constitutional nexus to tax the estate. No party claimed as much in that case, and that possible federal issue went unmentioned by this Court. To the contrary, this court relied on *Worcester County Trust Co.*'s statement that no issue of federal law would be raised if each State taxed the estate for its conclusion that federal law was not implicated by the competing claims to the Hughes estate. See *Cory*, 457 U.S. at 89.

[13] Because the court of appeals correctly concluded that Oklahoma's Eleventh Amendment immunity was not implicated in this case, the issue of congressional power to abrogate state sovereign immunity pursuant to the Bankruptcy Clause, U.S. Const. Art. I, § 8, Cl. 4, is not presented.

3. Finally, petitioner contends (Pet. 25-30) that this Court's review is warranted to determine whether Section 106(c) violated the State's sovereignty as protected by the Tenth Amendment. See *New York* v. *United States*, 112 S. Ct. 2408, 2417-2419 (1992). Under this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the protection of the States' sovereign interests as reflected in the Tenth Amendment is a matter ordinarily to be resolved through the political process without intervention of the federal courts. The Court has recognized, however, that "some extraordinary defects in the national political process might render congressional regulation of state activities invalid." *South Carolina* v. *Baker*, 485 U.S. 505, 512 (1988). Petitioner contends that this case presents such a situation.[14]

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[14] Petitioner also argues (Pet. 25-27) that review should be granted in this case for the purpose of reconsidering and overruling *Garcia*, and reinstating the doctrine of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Contrary to petitioner's assertion, this case does not present an appropriate vehicle for doing so. Under *National League of Cities*, a federal law was subject to invalidation on Tenth Amendment grounds only if (1) the challenged statute regulated the "States as States"; (2) the federal statute addressed matters that were attributes of state sovereignty; and (3) the States' compliance with the federal law directly impaired the States' ability "to structure integral operations in areas of traditional government functions." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-288 (1981). Petitioner cannot meet any of these criteria with respect to Section 106(c). The Bankruptcy Code does not regulate the States as States; the ability of the States to foreclose on defaulted loans of family farmers is not a traditional governmental function; and, even if it were, the availability of bankruptcy relief does not significantly impinge on the ability of States to operate a loan program. Indeed, petitioner's farm loan program was abolished a decade ago, see *Oklahoma Education Ass'n* v. *Nigh*, 642 P.2d 230 (Okla. 1982), and it is therefore difficult to understand how the Bankruptcy Code as presently

Petitioner argues (Pet. 27-28) that Section 106(c) had a particularly deleterious effect on Oklahoma and Wyoming, because those States, which between them had only seven seats in the House of Representatives when the statute was enacted, are the only ones that had farm loan programs using education trust funds that were subject to being written down under the Code. Petitioner argues that the inability of Oklahoma and Wyoming to protect their interests in the political process warrants judicial intervention on Tenth Amendment grounds. Petitioner's Tenth Amendment claim does not warrant this Court's review.

Petitioner offers no reason to think that Section 106(c) or any other provision of the Code was directed at the interests of Wyoming and Oklahoma in particular. Section 106(c) does not discriminate by its terms between any governmental unit; it applies equally to all States and the United States. Petitioner cites nothing in Section 106(c)'s legislative history to support the proposition that the statute was targeted specially at Wyoming and Oklahoma's farm lending schemes. Finally, there is no basis for petitioner's assertion that Section 506(a)—which applies to claims of all creditors generally—works any particular hardship on those States.[15]

In any event, even if petitioner's Tenth Amendment claim had arguable merit, review by this Court at this

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enacted imposes on the State's sovereign function of operating such a program.

[15] Moreover, the impression conveyed by petitioner that Section 106(c) was some sudden, unthoughtful invention is incorrect. The need for a provision addressing the States' sovereign immunity was recognized by the Commission on Bankruptcy Laws five years before the Code was enacted, and the matter received extensive consideration by both houses of Congress. See *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. at 111-113 (Stevens, J., dissenting).

time would be highly premature. Petitioner cites no case, from any court, that calls into question the constitutionality of the Bankruptcy Code on Tenth Amendment grounds. To the contrary, the federal bankruptcy system has proven to be workable, and has not impaired the ability of the States to fulfill their sovereign role in our federal system. See, *e.g.*, *In re Locarno*, 23 Bankr. 622, 625-626 (Bankr. D. Md. 1982); *In re Erlin Manor Nursing Home, Inc.*, 86 Bankr. 307, 311-312 (D. Mass. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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